IN THE

Supreme Court of the United States

October Term, 1977

No. 77-86

CHARLES LESTER GREGG

Appellant

v.

STATE OF INDIANA

Appellee

ON APPEAL FROM THE COURT OF APPEALS OF INDIANA

JURISDICTIONAL STATEMENT

JOHN T. MANNING
130 E. Washington Street, #912
Indianapolis, Indiana 46204
Attorney for Appellant

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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JURISDICTIONAL STATEMENT

Appeal is taken from the decision of the Court of Appeals of Indiana, in an opinion announced November 30, 1976, affirming Appellant's convictions of criminal offenses by the Vigo Circuit Court on November 25, 1974, and this Statement is presented to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is posed.

Opinion Below

The opinion of the Court of Appeals of Indiana is reported at 356 N.E.2d 1384. Copies of the opinion and of the order of the Supreme Court of Indiana denying transfer are annexed hereto as Appendix A.

Jurisdiction

Appellant's convictions of aggravated assualt and assualt and battery by the Vigo Circuit Court were affirmed by the Court of Appeals of Indiana on November 30, 1976. Appellant's timely petition for rehearing was denied by the Court of Appeals of Indiana on January 19, 1977, and his timely petition for transfer was denied by the Supreme Court of Indiana, DeBruler, J., dissenting, on April 15, 1977. The jurisdiction of the Supreme Court of the United States over this appeal of Appellant's claim that he was denied the due process of law guaranteed by the fourteenth amendment to the Constitution of the United States through application by the trial court of the Indiana statute governing the procedure to be followed where the insanity defense is raised in a criminal case lies under 28 U.S.C. § 1257(2). These decisions uphold the jurisdiction of the Supreme Court of the United States to review such a decision:

Dahnke-Walker Milling Co. v. Bondurant, 257 US. 282(1921);

Cohen v. California, 403 U.S. 15(1971).

Question Presented

Whether Appellant was deprived of due process of law under the fourteenth amendment to the Constitution of the United States, when after he put up the defense of insanity at his criminal trial the court failed to call as its own witnesses 2 psychiatrists who could give fully informed opinions upon the issue of sanity, and the governing Indiana

statute obligated the trial court to call at least 2 experts to testify impartially upon the issue, so taking proof on the insanity issue out of the control of the defendant and the state and giving it to the trial court?

Statute Involved

Ind. Code §§ 35-5-2-1 and 35-5-2-2 are set forth following:

> Sec. 1. When the defendant in a criminal cause desires to plead that he was of unsound mind at the time the offense charged was committed, he himself, or his counsel, must set up such a defense specially in writing, and the prosecuting attorney may reply thereto by a general denial in writing.
>
> Sec. 2. At the trial of such cause, evidence may be introduced to prove the defendant's present sanity or insanity, or his sanity or insanity at the time at which he is alleged to have committed the act charged in the indictment or information. When an insanity defense is pleaded, the court shall appoint two (2), or three (3), competent disinterested physicians to examine the defendant, and to testify at the trial. Such testimony shall follow the presentation of the evidence for the prosecution and for the defense, including testimony of medical experts employed by the state and by the defense, if any. The medical witnesses appointed by the court may be cross-examined by both the prosecution and the defense, and each side may introduce evidence in rebuttal to the testimony of such medical witnesses.

Statement

Appellant was charged with assault with intent to kill Jack Petty and Margie Petty in the Vigo Circuit Court on May 29, 1974. He asserted the defense of insanity by special plea in writing on August 5, 1974.

Trial was held beginning November 19, 1974. The evidence brought out at trial makes plain that Appellant shot

Jack Petty and Margie Petty at the same time on May 29, 1974, when Mr. Petty came to Appellant's house to demand his son's wallet, which Appellant had found on the ground outside his house during the winter. When Mr. Petty would not leave, Appellant got his pistol and tried to drive Mr. Petty away by threatening to use it against him. When Mr. Petty still would not leave, Appellant shot him, then his wife Margie, who sat in the Pettys' car on the edge of Appellant's yard, and then Mr. Petty again as he ran away.

Appellant attempted to prove self-defense with his own testimony and his wife's that just before the shooting, Mr. Petty had made threatening movements around his car and had reached inside, and that as he did he shouted, "I've got one too," in response to Appellant's display and threat to use his pistol if Mr. Petty did not leave. Such testimony on Appellant's side was met with testimony by Mr. Petty and his wife, Margie, that Mr. Petty had done nothing to provoke the shooting and that he had not indicated by voice or movement that he had a gun too and was not afraid to use it. The trial court excluded evidence from the witness Myrtle Hickman, Appellant's next door neighbor for years, that she had heard someone shout, "I've got one too," during a disturbance in the direction of Appellant's house, just before the shooting, and that the voice was not Appellant's. The exclusion of Mrs. Hickman's evidence was held error by the Court of Appeals of Indiana, but harmless.

Pursuant to statute, Ind. Code § 35-5-2-2, the trial court called 2 psychiatrists as its own witnesses at the close of the evidence.

Yon Sun Pak, a Korean psychiatrist who had some difficulty making himself understood to the reporter and who was testifying in court for the first time, said that Appellant's impulse control and his tolerance for stress had been

impaired by the truck wreck Appellant had been in, in 1972, and that his personality had changed as a result of the trauma. Dr. Pak was sure that Plaintiff was not a malingerer. Nonetheless, Dr. Pak could not say how much Appellant was affected by the wreck and he could not give an opinion whether Appellant was sane when he shot the Pettys.

William Vance, a board-certified psychiatrist, could give no opinion either whether Appellant was sane when he shot the Pettys, because tests that he thought necessary, particularly an electroencephalogram under drugs of stress, an interview under sodium amytol, and projective psychological testing, had not been done. Dr. Vance testified that the symptoms related by Appellant were like those in psychomotor or petit mal epilepsy, where one is not conscious of what is going on, yet is in complete control, and that Appellant's normal control could have been overwhelmed by the stress of the moment before the shooting. Dr. Vance could not say without running the tests.

The jury found Appellant guilty on November 25, 1974 of the lesser included offenses of aggravated assault on Jack Petty and simple assault and battery on Margie Petty, and it sentenced Appellant to 1-5 years for the first and to 6 months for the latter.

The Court of Appeals of Indiana affirmed on appeal November 30, 1976, and denied rehearing without opinion January 19, 1977. The issue presented here, the unconstitutional application of the Indiana impartial expert insanity witness statute under the fourteenth amendment to the Constitution of the United States, was held by the Court of Appeals never to have been duly raised and to have been waived, but because of the importance of the issue the court went on to decide the issue in its opinion, holding that Ap-

pellant had received the intended benefit of the statute, the raw data supplied by the 2 psychiatrists, and that he was not entitled to an opinion from either of them upon the issue of insanity.

The Supreme Court of Indiana denied transfer without opinion, DeBruler, J., dissenting.

The Federal Question Is Substantial

I. The case is within this Court's jurisdiction.

Although Appellant did not make an issue of the constitutionality of the application of Indiana's impartial witness statute to him at trial and did not do so until he appealed to the State Court of Appeals, that court chose to ignore his waiver and to decide the question under the due process clause of the fourteenth amendment because of its importance. Hence, the Indiana courts have sustained the constitutionality of the statute as it was applied here, and therefore the appeal is brought within 28 U.S.C. § 1257(2), which provides for appeal from a state court's decision upholding the constitutionality of a statute attacked as repugnant to the federal Constitution.

As in *Dahnke-Walker Milling Co. v. Bondurant,* supra, and *Cohen v. California,* supra, the statute whose application is contested here is not unconstitutional on its face or necessarily unconstitutional in every application, but only in its application here, where it was so applied that Appellant was left without his insanity defense because the trial court did not furnish the proof from its impartial experts that it had a duty to furnish. The statute took the ability to prove insanity away from Appellant, but it gave no adequate proof instead.

The same sort of difficulty arose in *Dahnke-Walker Milling Co. v. Bondurant,* where a proper state statute taxing

grain transactions was stretched to an interstate transaction, not a necessary application of the statute at all, and in *Cohen v. California,* where a disorderly conduct statute was made to apply to speech protected by the first amendment because it provoked disorderly conduct by others, scarcely a necessary application. In both of those cases, this Court upheld its jurisdiction to decide appeals contesting the constitutionality under the federal Constitution of those rather strange and perhaps wayward applications of the statutes. The same may be said of the application given the impartial witness statute by the State Court of Appeals here. It is not likely that the legislature intended that it would be used to deprive a defendant of expert opinion testimony on the issue of insanity. The purport of the statute seems quite the opposite. Yet that is the result reached here. All the same, the application has been approved against the federal constitutional standard of the due process clause of the fourteenth amendment, and so, as in the other 2 cases, it falls within this Court's appellate jurisdiction, even though the application seems peculiar.

II. The decision of the Court of Appeals of Indiana is incompatible with *Pate v. Robinson,* 383 U.S. 375 (1966).

This Court decided in *Pate v. Robinson,* supra, that the state trial court had a duty under the due process clause of the fourteenth amendment to make a full inquiry into the competence of a defendant on trial as to whom there was cause to believe he was insane and so incompetent to be tried, even though that inquiry entailed interrupting the trial and holding a separate jury trial on competency.

Pate v. Robinson dealt with the issue of competency to be tried, and this case deals with insanity at the time of the

offense charged. Yet the matter of the mental state of the defendant is the same. If it is a breach of due process under the fourteenth amendment to try one who is insane, then it is at least as great a breach of that same guarantee to convict a defendant who was insane when the offense was committed. Insanity removes one from the power of the criminal law, because it does not treat with the insane. If the trial judge in *Pate v. Robinson* had a duty to inquire into the competency of the defendant there under a state statute, and his failure to do so was a delict under the due process clause of the fourteenth amendment, so too was the failure of the trial judge here to muster the proof on the insanity issue he was bound to provide by the impartial witness statute, where the most serious and perplexing question was raised by the experts, one of whom could not reach an opinion the matter was so close or obscure to him, and the other of whom could have if he had been given the opportunity to perform certain tests.

The trial judge's failure here is all the worse because it is plain that the jury was swayed by the incomplete proof on the insanity issue that was given. They found Appellant guilty only of simple assault and battery and gave him but 6 months for shooting Margie Petty in the back of the head, when Appellant clearly had no self-defense claim as to her, and the charge was the far more serious one of assault with intent to kill. If Dr. Vance had completed his tests and then given his opinion that Appellant had no control when he shot the Pettys, it is likely that he would have been entirely acquitted.

III. The question is of general importance because many states have impartial witness statutes governing the insanity defense.

Abraham S. Goldstein, in his work, The Insanity Defense, states as follows regarding the prevalance of the kind of statute that is challenged here in its application:

> In thirty-one states and the District of Columbia, statutes provide for court appointment of a psychiatrist in cases involving insanity or incompetency. These statutes do not turn on indigence. Their original objective was to eliminate the so-called "battle of experts" by introducing impartial experts.

at 131. Professor Goldstein explains the critical feature of these statutes:

> The most important and dramatic feature of the procedure is the added credibility which accrues to the "impartial" expert appointed by the court. Judge and jury tend to believe him. Prosecutors dismiss proceedings and defense counsel forego reliance on the insanity defense in accordance with his opinion. Indeed, advocates of the procedure rely heavily upon this very fact in arguing it is needed to correct the "partisan" battle of experts.

Idem, at 132-33.

Since the impartial witness statute is used so commonly among the states, it is essential that it be administered in a fair manner. This case exposes a grave danger in the statute, that the defendant can be deprived of the proof he needs on the insanity issue if the trial judge is not diligent is assuring that the witnesses he calls are prepared to testify and that the defendant gets the full benefit of the statute. As Professor Goldstein points out, the authority with which the impartial expert is cloaked in court cannot

be challenged easily by the defendant, so that his ability to prove his own insanity is largely lost to the court under such a statutory scheme. Where a defendant is deprived of the ability to prove a defense, the due process clause of the fourteenth amendment dmands that an adequate substitute be supplied.

This Court should take this opportunity to examine the constitutional problems lurking in the application of the impartial witness statutes which in more than half the states determine the vitality of the insanity defense.

Conclusion

The decision below conflicts with a decision of this Court. The issue presented is of importance to more than half the states. Plenary review ought to be granted.

Respectfully submitted,

JOHN T. MANNING
130 E. Washington Street, #912
Indianapolis, Indiana 46204
Attorney for Appellant

APPENDIX

APPENDIX A

Opinion and Decision of the Court of Appeals of Indiana.

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

CHARLES LESTER GREGG, *Appellant (Defendant Below),*	)	
-v-	)	NO. 1-675 A 99
STATE OF INDIANA, *Appellee (Plaintiff Below).*	)	

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable Charles K. McCrory, Special Judge

LOWDERMILK, J.

STATEMENT OF THE CASE:

Defendant-appellant, Charles Lester Gregg (Gregg) was charged in separate informations with having committed the crimes of assault and battery with intent to kill both Jack and Margie Petty.[1] Judgment was entered on the

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[1] IC 1971, 35-13-2-1 (Burns Code Ed.).

[2] Ind. Rules of Procedure, Post Conviction Rule 2.

jury's verdicts of guilty of aggravated assault as to Jack Petty (Jack), and guilty of simple assault and battery as to Margie Petty (Margie). Following the trial court's overruling of Gregg's belated motion to correct errors[2] this appeal was perfected.

We affirm.

FACTS:

The facts necessary for our disposition of this appeal are as follows: On May 29, 1974, Jack went to the home of Gregg to recover a wallet belonging to his son which Gregg had found on his property. Upon Gregg's refusal to return the wallet, Jack and Gregg engaged in a heated exchange of words, resulting in Gregg rushing into his house.

Shortly thereafter, Gregg came out of his house armed with a pistol. Mrs. Gregg then told Jack "that he had better leave because Mr. Gregg had a pistol." The Greggs testified that at this point Jack exclaimed "I've got one too." The Pettys deny that this statement was made.

Jack then moved first to the passenger side of his car. Next, he moved around his car to the driver's side. At this point, Gregg sprang from his position by his work bench in his yard to the passenger side of Jack's car. Gregg then shot Jack who was standing on the other side of his car in the arm or shoulder. Gregg then shot Margie in the back of the head. She was sitting in the front seat on the passenger's side of her husband's car. Gregg then shot Jack once more in the back as he was running across the street.

ISSUES:

1. Whether Gregg was proven sane beyond a reasonable doubt.

2. Whether the trial court's instruction on self-defense was erroneous.
3. Whether the jury's verdict is inconsistent.
4. Whether the trial court erred in excluding testimony of defense witness Myrtle Hickman who would have testified she heard a voice from the direction of Gregg's property say "I've got one too."

DISCUSSION AND DECISION:

ISSUE I:

Gregg contends that the State failed to prove his sanity beyond a reasonable doubt. He argues that immediately after he shot Jack in the shoulder he blanked out and could not remember anything else that happened until he regained his powers of recollection sometime after he had been taken into police custody. Gregg points out that neither expert appointed by the court[3] could render an opinion as to whether he was sane at the time of the shootings. Dr. Vance testified that he would need time to conduct additional psychiatric tests before he could make a judgment as to Gregg's sanity at the time of the shootings. Gregg continues by arguing that he was entitled to have expert testimony

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[3] IC 1971, 35-5-2-2 (Burns Code Ed.) provides in pertinent part the following:

> ". . . When an insanty defense is pleaded, the court shall appoint two [2], or three [3], competent disinterested physicians to examine the defendant, and to testify at the trial. Such testimony shall follow the presentation of the evidence for the prosecution and for the defense, including testimony of medical experts employed by the state and by the defense, if any. The medical witnesses appointed by the court may be cross-examined by both the prosecution and the defense, and each side may introduce evidence in rebuttal to the testimony of such medical witnesses. . . ."

and to an expert opinion on the matter of his sanity. If not, the doubts as to his sanity held by the psychiatrists were binding on the jury.

When a criminal defendant raises the defense of insanity, the burden rests upon the State to prove the defendant's sanity beyond a reasonable doubt. *Riggs v. State* (1976), — Ind. —, 342 N.E. 2d 838, 841; *Brattain v. State* (1945), 223 Ind. 489, 61 N.E. 2d 462.

The State need not reply upon expert testimony to meet its burden of proof. *Feller v. State* (1976), — Ind. —, 348 N.E. 2d 8. The question of a defendant's sanity is one to be resolved by the trier of fact. *Riggs, supra,* at page 841. The trier of fact is free to look at all relevant evidence on the issue of a defendant's sanity, including the testimony of laymen and the acts surrounding the crime itself *Stamper v. State* (1973), 260 Ind. 211, 294 N.E. 2d 609: *Fitch v. State* (1974), — Ind. App. —, 313 N.E. 2d 548.

When reviewing the sufficiency of the State's evidence this court will neither weigh the evidence nor judge the credibility of witnesses. *Wilson v. State* (1975). — Ind. —, 333 N.E. 2d 755. Rather, we will look to the evidence most favorable to the State and the reasonable inferences to be drawn therefrom. When there is substantial evidence of probative value to support the verdict of the trier of fact the judgment of the trial court will be affirmed. *Riggs, supra,* at page 841 and cases cited therein.

The evidence most favorable to the State reveals that following an argument over a wallet, Gregg went into his house, emerged with a gun, and shot Jack in the arm or shoulder. Gregg then pointed the gun at Margie and exclaimed "I might as well give you some of it too," and then shot her in the back of the head. Gregg then shot Jack a

second time in the back as he was running across the street. Gregg's wife testified that immediately preceding this last shot she heard her husband say "you coward."

After the shooting, Gregg went back into his house and called the police. Shortly thereafter he called the police again and requested an ambulance. Next, Gregg called his attorney and said "Bob, I'm in trouble, I'm going to be needing you" and 'I'll see you at headquarters."

The record discloses that Gregg made the following statement to Officer Donald E. Bingham while in custody at the police station:

"• • •

Q. What were these statements?

A. He had said something about he had found a billfold of Mr. Petty's son below his window — sometime during the winter. And — he also stated that Mr. Petty had come over to the house and he advised him that — to leave —several times. And — he also stated that Mr. Petty had said 'I'm going to get my gun' and left — and went to the car, leaned inside — and —he come out of the car — Mr. — he said he thought Mr. Petty had something and he shot — and thought he had missed — and — he said that at that time Mrs. Petty grabbed the gun and a shot went off. And — that's all, I guess.

Q. Okay. He stated that — that Mrs. Petty grabbed the gun?

A. Yes, sir.

Q. Did he say anything about a third shot that was fired?

A. No, sir.

• • •"

In *Stamper, supra,* our Supreme Court stated at page 611:

"Appellant takes the position that the State failed in this burden because the two psychiatrists appointed by the court to examine the appellant filed separate reports, each stating that they were of the opinion that the appellant was under such stress at the time of the killing that he was unable to control his emotions and actions and at that time of unsound mind. *However, the reports of these doctors did not constitute the sole evidence submitted to the jury for their determination as to the appellant's sanity at the time of the killing.* Police officers testified that when they talked to the appellant after he had discovered his wife's death and before the death of Kerins, he had calmed down and was showing no indication of hysteria. There is also evidence from which the jury could conclude that appellant's past behavior had indicated that he was a man with a violent temper, and he had previously attacked persons including his wife and had previously threatened to kill Kerins. There was evidence from which the jury could determine that the appellant was merely giving vent to his violent temper when he attacked and killed Kerins, rather than being the victim of temporary insanity. *We have repeatedly held that is is within the province of the jury to determine the fact of the sanity of the appellant at the time in question, and that they may accept or reject the statements of any of the witnesses in that regard including psychiatrists. So long as there is evidence to support the issue of sanity for which the State bears the burden or proof, this Court will not disturb their verdict. Twomey v. State* (1971), Ind., 267 N.E. 2d 176, 24 Ind. Dec. 713." (Our emphasis.)

We are of the opinion that the evidence as outlined above, when viewed most favorably to the State, was sufficient to allow the jury to find Gregg sane at the time he shot Jack and Margie Petty.

Under this assignment of error, Gregg also argues in his brief that he was denied due process of law under the Fourteenth Amendment to the United States Constitution because the trial court did not, *sua spone,* continue the trial when the court appointed experts were unable to give a definitive opinion on his sanity as of the time of the shootings.

We note that neither of Gregg's contentions were specifically set out in his belated motion to correct errors. Further, at trial, he neither objected nor moved the court to continue the trial for the purpose of allowing the expert additional time within which to conduct tests. Having failed to have done so, the alleged errors, if any, were waived for purposes of appellate review. Indiana Rules of Procedure, Trial Rule 59(B)(G); *Hurst v. Hurst* (1975), — Ind. App. —, 335 N.E. 2d 245; *Dudley Sports Co., Inc. v. Schmitt* (1972), 151 Ind. App. 217, 279 N.E. 2d 266.

Although Gregg waived the claimed error we believe it to be of sufficient import to write on it.

We are of the opinion that the trial court *did not err* in failing *sua sponte* to grant a continuance when the court appointed experts failed to render a definative opinion on the specific question of whether Gregg was sane at the time he allegedly committed the crimes of which he was charged.

In *James v. State* (1974), — Ind. —, 307 N.E. 2d 59, our Supreme Court therein at page 61 stated:

"... Although the medical experts failed to testify with specificity concerning the defendant's power of will to resist an impulse to commit the homicide, they both concluded their testimony with their opinion that he was legally sane at the time of the offense. Even without this testimony, however, or even if the medical

testimony had supported the defendant's contention that he acted under an irresistible impulse, the jury was justified, from the other evidence, in concluding that such was not the fact. The ultimate determination of legal sanity was to be made by the jury from all the evidence of probative value. . . .

The following language from *United States v. Freeman* (2d Cir. 1966), 357 F. 2d 606, 619, quoted by this court in *Hill v. State* (1969), 252 Ind. 601, 617, 251 N.E. 2d 429, 438 explains the responsibility of the jury in such matters.

"* * *At bottom, the determination whether a man is or is not held responsible or his conduct is not a medical but a legal, social or moral judgment. Ideally, psychiatrists — much like experts in other fields — should provide grist for the legal mill, should furnish the raw data upon which the legal judgment is based. It is the psychiatrist who informs as to the mental state of the accused — his characteristics, his potentialities, his capabilities. *But once this information is disclosed, it is society as a whole, represented by judge or jury, which decides whether a man with the characteristics described should or should not be held accountable for his acts.* In so deciding, it cannot be presumed that juries will check their common sense at the courtroom door. (our emphasis) *United States v. Freeman, supra,* 357 F. 2d p. 619-620.' " (Original emphasis.)

We are of the opinion that the underlying purpose of IC 1971, 35-5-2-2, *supra,* was met in the case at bar, and there was no infringement of Gregg's constitutional rights.

The record discloses that although the two court appointed experts were unable to give a definitive opinion on the issue of Gregg's sanity at the point in time when the crime was committed; nevertheless, during cross-examination, both parties elicited substantial testimony for the jury

to consider on Gregg's mental condition in general.[4] We believe that this was just the type of "raw data" spoken of in *James, supra,* which a jury should properly have before it and consider in making its difficult decision of whether a criminal defendant was sane at the time he allegedly committed a criminal act.

Additionally, it should be noted that IC 1971, 35-5-2-2, *supra,* fully protects a criminal defendant's right to call expert witnesses of his own choosing to rebut the testimony of the court appointed experts which tends to be unfavorable to his defense of insanity. The record discloses that Gregg fully understood the nature of this right. On August 21, 1974, Gregg petitioned the court to allow him to be examined by his retained psychiatrist, Dr. David M. Crane, which petition was granted on August 26, 1974. The results of this examination, if an examination were made by Dr. Crane, were not introduced into evidence at Gregg's trial.

The court was at a great disadvantage to know whether to recess the trial or grant a continuance, *sua sponte,* as counsel for Gregg may have had knowledge which prompted him to do as he did in the best interests of Gregg and counsel did not desire more psychiatric evidence after a further examination. Counsel may have, in his better judgment, deemed it expedient for Gregg to "let a sleeping dog lie."

ISSUE II:

Gregg next contends that the trial court's amended instruction on self-defense was erroneous. The record dis-

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[4] The record discloses no less than 55 pages of testimony from the court appointed experts on Gregg's general state of mental health.

closes that Gregg failed to object to the trial court's giving to the jury his final instruction, as amended by the court, on self-defense. A party must object to the giving of an instruction before the jury retires to consider its verdict, or the error, if any, is waived. TR. 51(C); *McDonald v. State* (1976), — Ind. —, 346 N.E. 2d 569; *Chicago South Shore & South Bend Railroad v. Brown* (1975), — Ind. App. —, 323 N.E. 2d 681.

ISSUE III:

Gregg next contends that the jury's verdicts were inconsistent. He argues that since the shootings were close together in time and space, the jury should have returnd verdicts of guilty of simple assault and battery as to both Margie and Jack Petty.

Gregg was charged in two informations with having committed the crimes of assault and battery with intent to kill both Jack and Margie Petty. Although the criminal acts were close together in time and space, Gregg perpetrated two distinct crimes. Both aggravated assault and battery, if bodily injury is alleged, and simple assault are lesser included offenses of assault and battery with intent to kill. *Thomas v. State* (1970). 254 Ind. 600, 261 N.E. 2d 588; *Young v. State* (1967), 249 Ind. 286, 231 N.E. 2d 797. A criminal defendant charged in separate informations of committing two distinct crimes has no cause to complain if the jury should return a verdict of guilty of proper lesser included offenses.

ISSUE IV:

Gregg argues that it was error for the trial court to exclude as hearsay the testimony of Myrtle Hickman that she heard a voice from the direction of Gregg's property say "I've got one too." Gregg's offer to prove also tended to

show that Myrtle would have testified that the voice she heard was not Gregg's. Therefore, Gregg's argument continues, that since Jack and he were apparently the only two people in the vicinity shouting at each other it would be logical for the jury to infer that it was Jack who made the statement. The excluded statement would therefore have lent credence to the "reasonableness" of his belief that Jack was about to inflict death or great bodily harm upon him.

We are of the opinion that the trial court erred in excluding the above testimony. *Nuss v. State* (1975), — Ind. App. —, 328 N.E. 2d 747. In light of the facts and circumstances surrounding the case at bar, such error was harmless and does not require a reversal.

In the case of *Brown v. State* (1972), 258 Ind 412, 281 N.E. 2d 801 at 802, our Supreme Court said:

> ". . . . However, in the case at bar, although the statement by the officer was improper, we hold that it is not reversible error under the circumstances of this case."

See also, *Dillard v. State* (1971), 257 Ind. 282, 274 N.E. 2d 387; *Moore v. State* (1972), 258 Ind. 200, 280 N.E. 2d 57; *Moreno v. State* (1975), — Ind. App. —, 336 N.E. 2d 675; Ind. Rules of Procedure, Trial Rule 61.

As was true in *Nuss, supra,* the statement "I've got one too", was not offered to show the truth of the matter asserted, i.e., the intentions of Jack. Rather, the statement was offered to show the reasonableness of Gregg's belief that Jack was about to inflict bodily harm upon him. Such testimony being relevant to Gregg's claim of self-defense, it was error for the trial court to have excluded it.

However, we are of the opinion that there was sufficient evidence for the jury to convict Gregg even though the testimony was excluded.

The record revealed that Gregg shot Jack not once, but twice, following the purported statement made by Jack of "I've got one too." In between these shots, Gregg shot Jack's wife, Margie. The first shot struck Jack in the arm or shoulder. The second shot struck Margie in the back of the head. The third shot struck Jack in the back as he was running across the street from Gregg. Before Jack was struck the second time while running across the street, Gregg was heard to say, "You coward." We do not understand Gregg to argue that he shot either Margie, or Jack in the back while running away from him, in self-defense.

Our Supreme Court has expressed their sentiments about such an argument in *White v. State* (1968), 251 Ind. 100, 239 N.E. 2d 577, wherein, at pp. 578-79 it was said:

> "It may have been proper for the appellant to arm himself after the threat by the deceased, and it may have been proper for the defndant to have fired the first shot acting in self defense. When, however, the deceased dropped his shotgun by his car, where it was found later, and ran unarmed away from the defendant and the defendant shot him in the back of the head while he was fleeing, the defendant was not acting in self defense at that time.
>
> 'One cannot, after his enemy has cast his weapon, and turned to fly, kill him, and successfully claim to have been acting in self defense. This also disposes of the claim that the evidence is not sufficient to sustain the verdict.' *Meurer v. State* (1891), 129 Ind. 587, 589, 29 N.E. 392."

Rather, Gregg argues that because of a pre-existing head injury he blanked out, and was unable to recall anything that happened after he fired the first shot at Jack. As we have stated above, the issue of Gregg's sanity or insanity was one to be resolved by the trier of fact. *Riggs* and *Stamper, supra*. This issue was resolved adversely to Gregg.

Therefore, even if the excluded testimony had been admitted into evidence, we are of the opinion that there was sufficient evidence for the jury to find that Gregg did not shoot Margie in the head, or Jack in the back while fleeing, in self-defense.

Judgment affirmed.

ROBERTSON, C. J. and LYBROOK, J. CONCUR.

Order Denying Rehearing of the Court of Appeals of Indiana.

No. 1-675A99

Charles Lester Gregg vs. State of Indiana

You are hereby notified that the Indiana Court of Appeals has on this day denied Appellants Petition for Rehearing.

Robertson, C. J.

WITNESS my name and the seal of said Court, this 19th day of January, 1977.

/s/ Billie R. McCullough

Clerk Supreme Court and
Court of Appeals

Order Denying Transfer of the Supreme Court of Indiana.

No. 1-675A99

Charles Lester Gregg v. State of Indiana

You are hereby notified that the Supreme Court has on this day denied Appellants Petition to transfer DENIED.

Givan, C. J. DeBruler, J. votes to grant.

WITNESS my name and the seal of said Court, this 15th day of April, 1977.

/s/ Billie R. McCullough

Clerk Supreme Court and
Court of Appeals

APPENDIX B

Notice of Appeal to Supreme Court of United States

Filed July 8, 1977, Billie R. McCullough
Clerk of the Indiana Supreme and Court of Appeals

IN THE

COURT OF APPEALS OF INDIANA
FIRST DISTRICT

No. 1-675-A-99

CHARLES L. GREGG,	)	Appeal from the Circuit Court of Vigo County, Hon. Charles K. McCrory, Special Judge
Defendant-Appellant	)	
vs.	)	
STATE OF INDIANA,	)	
Plaintiff-Appellee	)	

**NOTICE OF APPEAL TO
SUPREME COURT OF UNITED STATES**

Defendant-Appellant appeals from the judgment of this court of January 19, 1977, affirming the convictions of Defendant-Appellant by the Circuit Court of Vigo County of aggravated assault and simple assault and battery, transfer of which judgment was denied by the Supreme Court of Indiana on April 15, 1977.

Defendant-Appellant serves notice of such appeal pursuant to Rule 10 of the Supreme Court of the United States.

The parties on appeal will be Charles L. Gregg. appellant, and the State of Indiana, appellee.

The appeal is taken under 28 U.S.C. § 1257(2).

John T. Manning
Attorney for Defendant-Appellant
130 E. Washington St., #912
Indianapolis, Indiana 46204
Phone: 634-6163

PROOF OF SERVICE

A copy of the foregoing Notice of Appeal to Supreme Court of United States was mailed to the following person by depositing same in a United States mail box with first class postage affixed addressed to:

Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

John T. Manning

John T. Manning
Attorney for
Defendant-Appellant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-86

CHARLES LESTER GREGG, *Appellant,*

-vs-

STATE OF INDIANA, *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF INDIANA

MOTION OF APPELLEE TO DISMISS OR AFFIRM

THEODORE L. SENDAK
Attorney General of Indiana

ROBERT F. COLKER
Assistant Attorney General

ELMER LLOYD WHITMER
Deputy Attorney General
Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6420
Attorneys for Appellee

C. E. Pauley & Co., Inc., Indianapolis

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-86

CHARLES LESTER GREGG, *Appellant,*

-vs-

STATE OF INDIANA, *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF INDIANA

MOTION OF APPELLEE TO DISMISS OR AFFIRM

The State of Indiana, Appellee herein, by Theodore L. Sendak, Attorney General of Indiana, and Elmer Lloyd Whitmer, Deputy Attorney General, moves this Court to dismiss the appeal herein, or affirm the decision of the Indiana Court of Appeals (reported at 356 N.E.2d 138), and in support of said motion offers the following:

GROUNDS FOR DISMISSAL ON SUMMARY REVIEW

1. This appeal is not within the jurisdiction of this Court, for the reason that it is not in conformity with the rules of this Court (Supreme Court Rule 16, 1(a).).

2. The appeal herein does not present a substantial federal question for review (Supreme Court Rule 16, 1(b).).

3. It is manifest that the questions on which the decision in this appeal depend are so unsubstantial as to not need further argument but are clearly apparent in the decision below (Supreme Court Rule 16, 1(c).).

4. This appeal would require a review of the weight of the evidence and credibility of the witnesses in the trial, an improper invasion of the province of the trial jury (Supreme Court Rule 16, 1(d).).

5. This Court is not obligated to grant plenary review of the question herein presented under 28 U.S.C. 1257 (2), but instead may dismiss on summary review, without opinion.

ARGUMENT

I.

JURISDICTION IS DENIED

The Appellant complains of the "strange and perhaps wayward application" of the Indiana statute in the case at bar, and that this "application" bestows jurisdiction on this court to grant plenary review of the question herein. Appellant concedes the statute, Indiana Code 35-5-2-1 and 35-5-2-2, is not unconstitutional on its face or necessarily unconstitutional in every application, but "only in its application here". Appellant states: "The statute took the ability to prove sanity away from the Appellant, but it gave no adequate proof instead." (Page 6, Appellant's Jurisdictional Statement). The words of the statute (page 3, *Ibid*) refute any truth in this statement. Provision is made in the statute for the introduction of testimony of medical experts by each party in the trial, in addition to the court's witnesses required by the statute.

However, the statute does not require a statement of opinion or the conclusion of such witnesses, only their testimony. Appellant's sole basis for appeal is the absence of such opinion in their testimony, and asserts on this omission the trial court failed to "muster the proof on the insanity issue" (page 8, *Ibid*). Therefore, Appellant has not convincingly shown how the nature of his case and the decision of the Indiana Court of Appeals places this appeal within the jurisdiction of this Court under Supreme Court Rule 15, 1(e).

II.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

The case at bar is distinguished from *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836 (1966), relied on by Appellant. In *Pate v. Robinson* the issue concerned competency of a defendant to stand trial, and whether the trial court was required to *sua sponte* conduct a hearing on this question. The duty of a judge to determine the competency of a defendant for trial does not relate to proof of competency, under laws of insanity, at the time of the offense, as a defense, which is the question in the case at bar. The duty of the trial court under the Indiana statute required only the production of medical witnesses by the court, not *proof* of any matter. *Pate* is not applicable herein.

Appellant asserts the trial court's application of the statute deprived Defendant Gregg of an opportunity to present evidence of expert testimony on the sanity of Defendant, as though the statute bars all other expert (medical) testimony. To the contrary, the statute expressly provides that each party may present such testimony. I. C. 35-5-2-2. The opinion of the Indiana Court of Appeals reveals Defendant Gregg, prior to trial, was authorized by the court to retain a psychiatrist to examine Defendant,

but evidence therefrom was not introduced at trial. See the Court of Appeals' reference to a "sleeping dog", page 9-A, Appellant's brief.

Appellant's sole authority for the "general importance" of the question here presented are two quotes from a book on insanity as a defense, by a professor, but otherwise not documented or identified as a publication of any merit. The quotations presented for authority are patently inappropriate and reflect only subjective surmises of the author, whose experience is not presented. Such pseudo-authority need not be persuasive to this Honorable Court.

III.

APPELLANT WAS NOT DENIED DUE PROCESS

This Court long ago said "due process and equal protection of the laws are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government", in *Duncan v. Missouri,* 152 U.S. 377, 382, (1894). Recently this Court, in *U.S. v. MacCollom,* — U.S. —, 96 S. Ct. 2086 (1976), said neither the protection of the 14th Amendment or the 5th Amendment to the United States Constitution guarantees absolute equality or precisely equal advantages, but the context of criminal proceedings requires only adequate opportunity to present one's claim fairly. Under these definitions, the Indiana statute herein questioned, does not deny due process or equal protection as applied by the trial court.

IV.

APPELLANT SEEKS REVIEW OF THE EVIDENCE

Appellant asserts the failure of the trial court to "muster proof on insanity" was all the worse because "it is plain the jury was swayed by the incomplete proof on

the insanity issue" and that it is likely Defendant would have been acquitted if there was an opinion from each of the court's medical witnesses (page 8, Appellant's brief). Appellant desires not a fair trial, but acquittal, under the Statute.

The fallacy of Appellant's argument is his assertion the Indiana statute denies a defendant the "ability to prove his own sanity" (page 10, *Ibid*). Appellant says "the authority with which the impartial expert is cloaked in court cannot be challenged easily by the defendant . . . " (page 9 *Ibid*). Yet herein Appellant complains of the absence of an opinion of the witness in such testimony. The contradiction should be apparent. Defendant was better served without such opinions, it may be assumed. As it was, without opinions, the jury was presented with *raw evidence* on the mental condition of Defendant and thus could determine the issue of insanity without such partiality of the medical witnesses' opinions. To review the weight of such evidence, or determine the credibility of the medical witnesses, is beyond the scope of review and the jurisdiction of this Court in this appeal, on competency of the Indiana statute.

V.

SUMMARY REVIEW AND DISMISSAL IS PROPER

Under 28 U.S.C. 1257 (2) this Court may properly deny the appeal presented by Appellant, in summary review, without briefs or oral argument. *Colorado Springs Amusement Co. v. Rizzo,* — U.S. —, 96 S. Ct. 3228 (1976); *Hicks v. Miranda,* 422 U.S. 332, 95 S. Ct. 2281 (1975). See also *Sidle v. Majors,* — U.S. —, 97 S. Ct. 367 (1976), involving an Indiana statute.

CONCLUSION

WHEREFORE, the State of Indiana, Appellee herein, respectfully moves the Court to dismiss the appeal herein, or affirm the judgment of the Indiana Court of Appeals and the Indiana Supreme Court, by summary review; and for all other proper relief in the premises.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

ROBERT F. COLKER
Assistant Attorney General

ELMER LLOYD WHITMER
Deputy Attorney General
Attorneys for Appellee

Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6420